U.S. Department of Labor

Office of Administrative Law Judges
Heritage Plaza Bldg. - Suite 530
111 Veterans Memorial Blvd
Metairie, LA 70005

(504) 589-6201
(504) 589-6268 (FAX)

Issue Date: 07 June 2005

CASE NO.: 2004-LHC-2519

OWCP NO.: 07-166498

IN THE MATTER OF:

LANCE BOURQUE,
Claimant

v.

TETRA TECHNOLOGIES, INC.,
Employer

and

PACIFIC EMPLOYERS' INSURANCE CO.,
Carrier

APPEARANCES:

David J. Shea, Esq.
On behalf of Claimant

Christopher L. Zaunbrecher, Esq.
On behalf of Employer

Before: Clement J. Kennington
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (the Act), 33 U.S.C. § 901, *et. seq.*, brought by Lance Bourque (Claimant) against Tetra Technologies, Inc., (Employer) and Pacific Employers'

Insurance Co., (Carrier). The issues raised by the parties could not be resolved administratively, and the matter was referred to the Office of Administrative Law Judges for a formal hearing. The hearing was held on March 17, 2005, in Metairie, Louisiana.

At the hearing all parties were afforded the opportunity to adduce testimony, offer documentary evidence, and submit post-hearing briefs in support of their positions. Claimant testified, called LeVal Hartfield and introduced eight exhibits, which were admitted, including: various Department of Labor filings; deposition and medical records of Dr. Tessier and Joseph Archer, D.C.; medical records from Drs. Gervais, Williams, Rau, Milner, Batty, Ritterbush, Sheridan Orthopaedic Associates, Sheridan Clinic, Med/Aid Walk-in Medical Center and Terrebonne General Medical Center; as well as Claimant's wage records and timesheets at Employer.[1] Employer called Philip Badillo and introduced fifteen exhibits, which were admitted, including: deposition and medical records of Drs. Watkins, Kinnard and Tessier; Claimant's deposition transcripts; medical records of Drs. Milner and Ritterbusch; statement of Mr. Badillo; Employer's first report of injury; Claimant's time sheets from September, 2002; and photographs of the Chevron platform.

Post-hearing briefs were filed by the parties.[2] Based upon the stipulations of the parties, the evidence introduced, my observation of the witness demeanor and the arguments presented, I make the following Findings of Fact, Conclusions of Law, and Order.

I. STIPULATIONS

At the commencement of the hearing the parties stipulated and I find:

1. An accident occurred on September 19, 2002, in the course and scope of Claimant's employment.

2. An employer-employee relationship existed at the time of Claimant's accident;

3. Employer was advised of the accident on September 19, 2002;

[1] References to the transcript and exhibits are as follows: trial transcript- Tr.__; Claimant's exhibits- CX-__, p.__; Employer exhibits- EX-__, p.__; Administrative Law Judge exhibits- ALJX-__, p.__.

[2] Claimant submitted a 13-page, double spaced brief on May 6, 2005. Employer submitted an 8-page, double spaced brief on May 9, 2005.

4. Employer filed Notices of Controversion on June 18, 2003;

5. Informal conferences were held on July 23, 2003, and July 22, 2004;

6. Claimant's average weekly wage at the time of injury was $567.00;

7. Employer paid temporary total disability benefits for 14 weeks at a rate of $430.84 per week, for a total of $6,031.76.

II. ISSUES

The following unresolved issues were presented by the parties:

1. Nature and extent of Claimant's injury;

2. Medical benefits;

3. Section 903(c) Controversion based on intoxication.

III. STATEMENT OF THE CASE

A. Chronology:

Claimant was a roustabout for Employer in September, 2002. He was working on the Chevron platform when they were ordered to secure the platform for a hurricane evacuation. Claimant was carrying a 100 pound Kelly hose with Philip Badillo when he slipped and hit his left leg on a needle valve. Mr. Badillo dropped his end of the hose, and the weight fell on Claimant, who experienced sudden pain down his back and into his leg. He testified everyone was hurried to evacuate for the hurricane, so he kept working for thirty minutes until his shift ended. At that time, Claimant informed Mr. Hartfield and Mr. Whitney of his accident. (Tr. 36-40).

Claimant testified he first went to the doctor after the back-to-back hurricanes passed through Louisiana in September, 2002. He presented to Dr. Michael Watkins with leg pain; he testified his back pain started after his first doctor visit, but worsened over time. He described the pain as burning and stiffness. Later in his testimony, Claimant added he also jammed his finger in the accident. Dr. Watkins sent Claimant to Dr. Rau, who evaluated him on October

22, 2002. Dr. Rau diagnosed Claimant with a knee strain and recommended he receive orthopedic treatment. (CX-8h, p. 11). Claimant also saw Employer's Dr. Kinnard. He went to neurologist Dr. Gervais in February, 2003, and treated with chiropractor Joseph Archer for his back problems. Claimant testified he also treated with Dr. Charles Tessier, who prescribed therapy, medications and sent him to more doctors, including Dr. Warren Williams. Claimant testified his back hurt constantly throughout the summer of 2003, and Dr. Tessier told him an MRI revealed collapsed vertebrae at L4-5. Claimant testified that during this time Dr. Tessier did not release him to work, and indeed he could not work because of his pain. (Tr. 41-45, 51).

In the summer of 2003 Claimant moved to Sheridan, Wyoming, and on July 21, 2003, he began work for Aladdin Field Services as a supervisor working three days at a time; he left Aladdin because the company had financial troubles. While in Wyoming, Claimant treated with Dr. Batty, Dr. Milner and Dr. Ritterbusch for his leg and back pain. MRIs revealed problems with the L4-5 vertebrae and Dr. Milner recommended physical therapy which he could not afford. Dr. Ritterbusch diagnosed him with atrophy of the left leg and placed him at MMI on January 30, 2004. None of these doctors placed specific restrictions on Claimant's ability to work, though Dr. Milner released him to activity as tolerated and Dr. Ritterbusch suggested a functional capacity evaluation. Claimant treated with Dr. Bennett for his depression and anxiety; she prescribed him Prozac. (Tr. 45-51).

B. Testimony of Claimant

Claimant is a 35-year old male who worked mostly offshore before starting his job as a roustabout at Employer. His past work experience also includes hanging steel on land and a "little bit of everything." Claimant finished the 10th grade, foregoing a high school diploma, and never married. He lived in Houma, Louisiana, at the time of his accident then moved to Wyoming in 2003, returning to Denham Springs, Louisiana, three weeks before the formal hearing. (Tr. 54-55). Claimant testified he had a serious head injury thirteen years ago, and has since had difficulty communicating with others. He can read and write, but suffers from attention deficit disorder.

Claimant testified he has two DWI convictions, one which occurred six months prior to the hearing. He initially testified he had no drug convictions, then, admitted he was convicted of possessing drug paraphernalia three years ago before finally testifying he has no drug convictions and did not possess anything. Claimant has not filed workers' compensation before. (Tr. 56-58).

Claimant also testified he had no injuries to his left leg, groin or low back prior to his 2002 work accident. However, then he conceded he did have such injuries in a 4-wheel accident, but immediately testified "no, no [he] sure didn't" have such injuries. Claimant testified he injured his hip in a 4-wheeler accident five years ago, and treated with Dr. Michael Watkins for his injuries. Claimant testified he presented to Dr. Watkins with buttock pain; Dr. Watkins' notes of left lumbar pain shooting into the groin and occasionally the left leg were mistaken. Claimant also testified he suffered depression in 2001, including feelings of nervousness, irritability and trouble sleeping. (Tr. 58-62).

Claimant testified a piece of grating caused him to slip and fall, resulting in a bump on his leg. He continued to work, but had a limp secondary to pain, and asked Mr. Hartfield and Randy Lejeune for help with his duffel bag. He first saw a doctor one week after the accident, when he presented to Dr. Watkins with complaints of pain in his leg, back and finger. Claimant testified Dr. Watkins was mistaken if he only noted leg pain. He did not recall Dr. Watkins returning him to work. (Tr. 62-63, 65-69). Claimant also saw Dr. Kinnard, presenting with complaints of leg, low back and finger pain. Dr. Kinnard released him to work. (Tr. 68-69).

Claimant next treated with Dr. Tessier, a general practitioner, complaining of pain in his leg, back and finger. Dr. Tessier noted Claimant was able to twist at the lumbar and crack his back without pain, which Claimant denied. Dr. Tessier treated Claimant for his leg mass, prescribing muscle relaxers and pain pills. Claimant testified he also complained of groin pain which spread into his back and down the side of his left leg, although he stated these pains were different than those he experienced in 2001. Claimant last saw Dr. Tessier in 2003; he did not release Claimant to work. (Tr. 71-74, 81).

Claimant moved to Wyoming in April, 2003, and was employed at Aladdin Field Services within one week. However, pursuant to his October 21, 2003, deposition testimony, Claimant started at Aladdin on July 21, 2003. He supervised crews tying in methane gas wells; the job did not require much physical exertion. He explained the wells were smaller than natural gas wells in Louisiana; as supervisor he occasionally operated a back hoe to show his crew how to tie the lines. Claimant testified he worked at Aladdin for three to four months and earned $1100 every two weeks; he left Aladdin in October, 2003, secondary to a lack of work and pain. However, at his deposition Claimant stated he did not intend to continue working at Aladdin, but was going to wait and see if he was awarded

benefits in the present case to finish his physical therapy. (Tr. 75-80; EX-6, p. 15; EX-7, p. 3). Claimant then went to work for Cold Creek Well Services as an operator, setting pumps. In his deposition Claimant testified his title was "driller," but he explained that was the same thing as an operator. He testified at the hearing he worked three or four days at a time then would have weeks off because of a lack of work. He earned $14 per hour and worked there for a few months. Claimant testified at his deposition that he left Cold Creek because he was not getting paid on time, and that if he had gotten paid regularly he would have stayed on. However, at the hearing he testified he also left secondary to pain. (Tr. 83-86).

While in Wyoming, Claimant treated with Drs. Batty, Ritterbusch and Harper. On cross-examination, he testified he could not recall treating with Dr. Milner. However, he then testified Dr. Milner diagnosed him with hematoma of his leg, a cosmetic problem that did not have any symptoms. Claimant testified Dr. Milner did not inform him his back problems were unrelated to his leg injury or that the MRI showed no abnormality of the leg. (Tr. 80-81). Dr. Ritterbusch recommended physical therapy, but told Claimant there was nothing more he could do. He told Claimant he was a maximum medical improvement and released him to work. (Tr. 81-83). Claimant testified no doctor in Wyoming, or any doctor following Dr. Tessier, assigned him any work restrictions. (Tr. 87).

Currently, Claimant has a lump on his leg as a result of tears in his muscle tissues and a build up of fluid in his leg. His leg pain extends down into his feet and up into his hip, groin and low back. Claimant emphasized his current problems are in his shin and low back. (Tr. 63-65).

C. Testimony of Philip Badillo

Mr. Badillo was a floor hand for Employer in 2002. He worked with Claimant on the Chevron platform. Mr. Badillo corroborated Claimant's testimony regarding the circumstances of his September 19, 2002 accident, and saw a red bump on Claimant's leg. Mr. Badillo testified he told Claimant to fill out an accident report, but Claimant stated he did not want to because he could not pass the drug test. (T. 95-96). Mr. Badillo further testified he did not tell anyone about Claimant's statements until approximately one year after the accident when he was contacted by a lawyer to give a deposition in the present matter. (Tr. 97-98).

D. Testimony of LeVal Hartfield

Mr. Hartfield has been a supervisor at Employer's Belle Chasse, Louisiana, yard for the past four years; he has worked at Employer for seven years. In 2002, Mr. Hartfield was the night toolpusher on the Chevron platform, which was located on the Outer Continental Shelf. He testified Employer was plugging gas wells for Chevron. He also explained a toolpusher completed paperwork and was in charge of a crew of 4-6 men for each 12-hour shift. (Tr. 23-26, 32). Mr. Hartfield testified Claimant told him about his accident, wherein he hit his leg on a needle valve. Mr. Hartfield testified he saw a bump on Claimant's leg. He instructed Claimant to have his supervisor, Mr. Whitney, fill out an accident report in accordance with Employer's policy that only supervisors fill out such reports. Claimant informed him Mr. Whitney refused to complete a report, so Mr. Hartfield offered to do so. However, after talking with "Peanut" Neil about the situation, he was informed Mr. Whitney had to fill out the report. As such, Mr. Neil knew of Claimant's accident on September 20, 2002, although he did not have the details. (Tr. 28-33). Mr. Hartfield clarified he did not personally witness the accident or know exactly when it occurred. Claimant only complained to him about his leg pain. (Tr. 34).

E. Exhibits

(1) Claimant's Medical Records

Dr. Watkins, a general practitioner,[3] first treated Claimant on October 4, 2001, when Claimant presented with complaints of left lumbar area pain shooting into his groin and occasionally down his left leg as well as intermittent numbness in his left foot, depression, anxiety, irritability and difficulties sleeping. Dr. Watkins noted Claimant's symptoms had been consistent since a May 2001 four-wheeler accident in which he threw out his hip. (EX-8, pp. 2-3). Upon examination, Dr. Watkins noted left hip and lumbar tenderness, though a straight leg raise test was negative on the left, and x-rays of the lumbar spine and hip were normal. Dr. Watkins diagnosed Claimant with a lumbar strain and released him to work. On November 12, Claimant returned with complaints of cervical pain, though Dr. Watkins did not know the cause of the pain. (EX-8, pp. 3-5; EX-1, p. 6).

[3] Dr. Watkins testified by deposition on January 20, 2004. He has been a family practitioner since 1999 and is Employer's company doctor, performing employment physicals and worker's compensation cases. (EX-8, pp. 2, 9).

Dr. Watkins next treated Claimant on October 7, 2002, at which time Claimant complained of leg pain secondary to a work accident on September 19, 2002. Dr. Watkins noted a large, mildly ecchymatic bruise on Claimant's left leg, which was not infected but had some fluid built up. X-rays were negative. On October 21, 2002, Claimant's condition was unchanged, and Dr. Watkins testified the lump bulged out when Claimant placed weight on his left leg. Claimant also complained of leg pain and swelling which caused his left foot to go numb, and knee pain which Dr. Watkins attributed to compensating for the pain in his left leg. Claimant made no complaints of pain in his buttocks, groin, neck, back or ankle. (EX-8, p. 6; EX-1, pp. 1-4). Dr. Watkins diagnosed Claimant with a hematoma which he expected to heal by itself. He referred Claimant to a general surgeon at Rau Clinic and released him to work his regular duty. (EX-8, pp. 6-7; EX-1, p. 5).

Dr. David Rau evaluated Claimant on October 22, 2002, for complaints of left knee and leg pain. Dr. Rau noted pain, numbness and a hematoma in Claimant's left leg, as well as left knee pain on range of motion. He diagnosed Claimant with a knee strain and referred Claimant to Dr. Kinnard for an orthopedic evaluation. (CX-8h, pp. 1, 11).

Dr. Kinnard, an orthopedic surgeon,[4] first treated Claimant on November 6, 2002. Dr. Kinnard testified Claimant's medical history was negative for similar complaints. Claimant initially presented with pain in his left groin, lateral aspect of the left knee, ankle, as well as swelling and pain in the left shin. Physical examination revealed tenderness in Claimant's knee, normal range of motion in the hip and knee, normal ankle findings and swelling over the mid-region of Claimant's left shin. Dr. Kinnard testified these findings were consistent with a sharp blow to the shin. X-rays of the pelvis, left knee and tibia revealed an irregularity in the proximal fibula, which Dr. Kinnard attributed to an old injury or cystic mass. He diagnosed Claimant with a shin contusion and questionable bony injury. (EX-9, pp. 1-3; EX-2, pp. 1-2).

Claimant did not present with back pain at the first visit. Dr. Kinnard testified that if Claimant had injured his back in the accident, it most likely would have manifested by November 6, 2002. However, he later stated that absent any intervening accident, Claimant's back pain could be related to his September, 2002,

[4] Dr. Kinnard testified by deposition on October 27, 2004; he has been an orthopedic surgeon in the Houma area for 20 years. (EX-9, p. 1).

accident. Further, Dr. Kinnard testified that just because Claimant did not complain of back pain did not mean he did not have back pain. (EX-9, pp. 4-6).

Dr. Kinnard ordered a full body bone scan for Claimant which revealed abnormalities in his right middle finger and sternum, indicating either a fracture, infection, tumor or intense inflammation. On November 13, 2002, Claimant complained of pain in his right middle finger, stating he hyperextended it during his fall. Dr. Kinnard testified x-rays were negative for a fracture and the injury could have been due to a subsequent accident. (EX-9, p. 4). Dr. Kinnard also testified the bone scan was unremarkable for Claimant's lumbar spine, though it would not have revealed any bulging disc abnormalities. The scan provided no explanation for Claimant's groin pain and Dr. Kinnard assumed he strained a muscle in his groin. There was no evidence of a bony injury in Claimant's left shin or ankle. Dr. Kinnard diagnosed Claimant with a hematoma on his left leg secondary to a direct blow, and a muscle strain/sprain in the lower back which may have caused his groin pain. (EX-9, p. 5; EX-2, pp. 2-3).

Dr. Kinnard testified he did not recommend further diagnostic treatment for Claimant and released him to work without restrictions, stating a sprained finger should not result in disability. While a hematoma such as Claimant's can result in long-term swelling and tenderness with local irritation or sensitivity, Dr. Kinnard testified this rarely results in any functional impairment. (EX-9, pp. 6-7; EX-2, p. 3).

On February 3, 2003, Claimant presented to the Terrebonne General Medical Center Emergency Room with complaints of left hip, left leg and right hand pain which he associated with his September 2002 work accident. X-rays of his right hand showed no fracture or dislocation and left hip x-rays were normal. Claimant was diagnosed with a tendon injury of the right hand and contusion of the left hip. (CX-8e, pp. 20-21).

Claimant's attorney referred him to Dr. Donald Gervais in Houma. Claimant presented to Dr. Gervais on February 12, 2003, with complaints of pain in his left hip, left leg, right hand, neck and back. He described his September, 2002, work accident consistently with his testimony, *supra.* Dr. Gervais diagnosed Claimant with low back and left leg pain, left groin pain, neck pain and right hand pain. He recommended lumbar spine and neck MRIs, an EMG of Claimant's lower extremities, physical therapy and medication. (CX-8a, pp. 1-6).

Claimant was then referred to Dr. Charles Tessier, III, a general practitioner, by his attorney.[5] He was first seen at Dr. Tessier's MedAid Clinic on March 10, 2003. Claimant presented with complaints of back, left hip and leg pain from a September, 2002, fall. Upon examination, the physician's assistant noted a non-tender mass affect at Claimant's C6, swelling over the posterior neck, focal tenderness on palpitation over the sacral area, and extreme tenderness of the left sacral joint causing pain radiating down his left leg and into the groin. He also noted Claimant had vigorous lumbar range of motion without pain, exhibited when he purposely cracked his lower back by twisting rapidly at the waist. Dr. Tessier testified he would not expect this from someone with a serious back injury. (EX-10, pp. 3-5; EX-3, p. 1). Claimant also had a loss of range of motion in his right third finger, tenderness to palpitation of the left knee, but no ambulation problems secondary to ankle pain. Overall, Dr. Tessier testified Claimant's assessment was SI joint pain, left knee and ankle pain, decreased range of motion in his finger, some left groin pain as well as generalized anxiety disorder. Claimant was referred to an orthopedic doctor and prescribed medications including non-narcotic analgesic, muscle relaxers and Compazine for his anxiety. (EX-10, pp. 5-6; EX-3, p. 2).

Claimant next presented to MedAid on March 19, 2003, with complaints of leg pain; the medical records also indicated swelling and decreased flexion of the right finger, swelling on his left shin, tenderness of the lumbar spine and a positive straight leg test left. Dr. Tessier prescribed Lortab, recommended a lumber MRI and removed Claimant from work until further evaluation of his back pain. On this visit, Claimant also described his September 19, 2002 accident consistent with his testimony, *supra.* X-rays of Claimant's lower back taken on March 25, 2003, revealed arthritic changes at L4-5. (EX-10, pp. 7-9; EX-3, pp. 3-5).

On April 29, 2003 Claimant treated with Dr. Tessier, complaining of back, hip, leg and hand pain. The mass on Claimant's shin was still present and Dr. Tessier again recommended orthopedic treatment. He testified Claimant was unable to work secondary to his pain and finger injury, though he opined Claimant's back condition also affected his work status. (EX-10, pp. 9-10; EX-3, p. 5). A lumber MRI performed on May 19, 2003, revealed bulges at L4-5 and L5-S1 which affected the nerve roots coming out of the spinal area, as well as degenerative facet joint disease from L3-S1. Dr. Tessier testified these injuries

[5] Dr. Tessier has been a general practitioner in Baton Rouge since 1982; his practice has focused on family and occupational medicine. He is the president and medical director of MedAid Clinic. Dr. Tessier testified by deposition on October 28, 2004. (EX-10, pp. 1-2, 6-7).

were either the result of a traumatic injury or degeneration. On May 21, 2003, Claimant's condition was unchanged. (EX-10, pp. 10-13; EX-3, p. 4).

Claimant was evaluated by neurosurgeon Warren Williams, M.D., on May 28, 2003, upon referral from Dr. Tessier. Claimant described the September, 2002, accident to Dr. Williams, indicating he injured his back, right hand, left leg and left hip. Dr. Williams noted Claimant denied previous injuries to these areas. Upon exam, Dr. Williams noted Claimant was in moderate distress with a large hematoma on the left shin and decreased range of motion and tenderness in his lumbar spine and right hand. (CX-8d, pp. 1, 19-23). On June 18, 2003, Claimant complained of pain in his right paraspinal area, focal pain in his groin and pain in his right third finger. Dr. Williams reviewed Claimant's diagnostic studies including the May 19, 2003 MRI, discussed *supra*. Dr. Williams did not have an explanation for Claimant's groin pain, noting it could be the result of a possible femoral hernia. He recommended a urologic consultation and trigger point injections; otherwise, he suggested conservative treatment with medication and physical therapy would be sufficient. (CX-8d, p. 9).

Claimant next treated with orthopedic physician Dr. Milner in Sheridan, Wyoming, on September 4, 2003. He presented with complaints of left leg and right hand pain secondary to his September, 2002, work accident. Dr. Milner also noted Claimant suffered left lower extremity pain extending from his buttock to his ankle. Physical examination revealed tenderness and decreased flexion in Claimant's right hand, but passive full range of motion. Claimant had a normal gait. Dr. Milner found tenderness over the L5 joint, a negative SLR and full range of motion in Claimant's left hip. (CX-8i, p. 9). X-rays of the right finger were normal, x-rays of the left leg showed soft tissue calcification and x-rays of the lumbar spine showed hyperlordosis at L5-S1. Dr. Milner diagnosed Claimant with low back pain with Grade 1 retrolysthesis at L5-S1. He recommended physical therapy and an MRI of Claimant's left leg. He opined Claimant's left lower extremity symptoms were not related to his back symptoms. Claimant did not show for his September 18 and October 8, 2003 appointments with Dr. Milner. (CX-8i, pp. 9-10, 3).

On September 15, 2003, Claimant treated with Dr. Hugh K. Batty, requesting medication to relieve his pain; Dr. Batty prescribed Vioxx. X-rays of Claimant's lumbar spine taken that day showed normal alignment, no fracture, subluxation or disc space narrowing. Dr. Batty also noted Claimant's facet joints were normal, his SI joints were open and there were no signs of spondylosis. (CX-8k, pp. 2-3).

Claimant returned to Dr. Tessier on November 3, 2003, who noted swelling in Claimant's left leg, atrophy over the left ankle and complaints of pain in the left leg, foot and groin. Dr. Tessier testified Claimant was unable to work secondary to his lumbar abnormalities. However, he explained Claimant could perform light-duty jobs with no heavy lifting or driving. (EX-10, pp. 10-15; EX-3, p. 4). Dr. Tessier further testified Claimant related his injuries to his September 19, 2002 accident; however, he was unaware of when Claimant started complaining of back pain. Dr. Tessier explained back pain would arise within a reasonable time after a traumatic accident, usually within one or two months. He added that most people complain of pain close to the time of injury. (EX-10, pp. 15-16).

Claimant presented to Dr. Milner on December 31, 2003, with no complaints of right finger pain, but some burning in his left leg. An exam of his lower extremity revealed no change in condition. An MRI obtained on September 11, 2003, showed no abnormalities. Dr. Milner diagnosed Claimant with an asymptomatic leg herniation which did not require treatment, and released him to activity as tolerated. (CX-8i, pp. 2-3).

On January 21, 2004, Claimant presented to Dr. Ritterbusch, a colleague of Dr. Milner in Sheridan, Wyoming, with complaints of pain in his lumbar spine, groin and left leg and was prescribed Percocet for said pain. A lumbar MRI taken January 29, 2004, revealed a bulge at L5-S1 with slight neuroforaminal narrowing or lateral recess which could be the cause of his continued leg pain. On January 30, 2004, Dr. Ritterbusch recommended epidural steroid injections and opined Claimant had reached MMI, as his condition was unlikely to improve. He indicated surgery was not necessary nor would be of benefit to Claimant. Claimant experienced pain relief from the injection, but did not seek further injections because of their cost. (EX-4, pp. 3-5). At these visits, Claimant indicated he was having trouble finding work, but Dr. Ritterbusch encouraged him to work if he had the opportunity, noting that if Claimant felt impaired in his physical activities he should have a functional capacities evaluation. (EX-4, p. 4).

On October 15, 2004, Claimant returned to Dr. Ritterbusch with complaints of continued pain, tingling and burning in his left leg. He informed Dr. Ritterbusch he could work several days but then needs a few days off secondary to back pain. Physical examination revealed left leg atrophy and muscle herniation, a negative straight leg raise and decreased ankle jerk reflex. Dr. Ritterbusch noted the radiologist report for the January 29 MRI stated Claimant had a synovial cyst extending into his lumbar spinal canal compressing the left SI nerve root.

Claimant had been taking ibuprofen to relieve his pain. Dr. Ritterbusch recommended an MRI, epidural steroid injection and physical therapy. (CX-8l, p. 2). In a February 18, 2005 letter to Claimant's attorney, Dr. Ritterbusch indicated he would not put any restrictions on Claimant's ability to work, though he did encourage Claimant to have a functional capacity evaluation. He clarified he did not treat Claimant, but only evaluated him on two separate occasions. (CX-8m, p. 2).

(2) Deposition and Records of Joseph Archer, D.C.

Mr. Archer testified by deposition on January 14, 2004; he has been a chiropractor since 1990. Mr. Archer treated Claimant for a short time in 2001 for injuries he sustained in a four-wheeler accident; though he did not have records of this treatment, he recalled diagnosing Claimant with a strain in his low back. (CX-4, pp. 4-9; CX-8c, pp. 7-19). Claimant next treated with Mr. Archer on March 26, 2003, when he presented with complaints of pain in his hand, low back and leg secondary to a September, 2002, accident. Claimant indicated to Mr. Archer his pain had persisted since his accident. Mr. Archer testified he provided chiropractic treatment for Claimant's back pain and some physical therapy for his finger pain. (CX-4, pp. 10, 15-17).

Mr. Archer described Claimant's work accident as a fall from a ladder, resulting in Claimant hitting the platform and having a rod go through his leg. He testified he believed Claimant had been doing well since the 2001 treatment, as he was able to work offshore with only minor complaints of aches and pains. At the initial meeting, Mr. Archer noted Claimant's pelvis was out of alignment and he had burning sensation of the L5 nerve. He testified that pelvis injuries such as Claimant's normally result from lifting injuries, though they can also be caused by bending or stooping. (CX-4, pp. 20-23; CX-8c, pp. 33-39).

Mr. Archer prescribed a course of physical therapy for Claimant's back problems, including electrical stimulation of the muscles to help inflammation and spasm, and a pelvic adjustment, three times per week for three weeks. He treated Claimant on March 27 and 31, 2003; April 1, 2, 8, 9, and 23, 2003; May 12 and 28, 2003; and June 11, 2003. During this time, he noted Claimant was receiving temporary relief as evidenced by an increased range of motion following the therapy; as time progressed the relief lasted up to two weeks. On March 31, Mr. Archer reviewed Claimant's x-rays and noted no fractures or dislocations. On April 9, Mr. Archer performed physical therapy on Claimant's lumbar and cervical spine; he testified low back pain can result in compensating areas of the spine, such

as the cervical or thoracic. On April 23, he adjusted Claimant's sacroiliac joints and T4 vertebrae. Mr. Archer testified that on May 28, Claimant complained of pain in his shin, finger and neck; therapy was performed on the SI, T2 and C7 joints. On June 11, 2003, Claimant presented with groin pain, which Mr. Archer related to his sacroiliac sprain. (CX-4, pp. 24-29; CX-8c, pp. 22-32, 40).

Mr. Archer testified the knot in Claimant's leg was not a chiropractic injury and would not have hindered Claimant's return to work. However, for the period of March to June 2003, Mr. Archer would have restricted Claimant from working offshore secondary to his back problems. He also testified he would have recommended a work hardening program to test Claimant's strength before releasing him to any work. Mr. Archer explained the SI joint never heals as strong as it was originally, and is susceptible to re-injury. He further testified his findings were objective in nature, as he performed palpation of Claimant's spine at every adjustment, and Claimant could not control the fixation of his SI joint. (CX-4, pp. 46-53).

IV. DISCUSSION

A. Contentions of the Parties

Claimant contends his back injury is related to the September 19, 2002 accident, despite the delay in its onset. He argues delayed onset of back injuries is not uncommon, and once the injury manifested itself, his complaints were consistent thereafter. As such, Claimant argues all of his medical treatment is reasonable and necessary to the injury he sustained at work. Additionally, Claimant contends his testimony should be credited, as inconsistencies regarding the accident details and various symptom descriptions are not sufficient to completely discredit his testimony. Claimant also asserts he has established a *prima facie* case for total disability in that he is restricted from performing heavy manual labor. Finally, Claimant argues Employer has not submitted sufficient evidence to rebut the Section 20(c) presumption that his accident was not the sole result of intoxication; thus his claim is not barred under Section 3(c).

Employer contends Claimant's only injury from the September, 2002, accident was a bruised shin that did not result in any disability. It argues Claimant's other symptoms, including complaints of pain in his hand, back, hips, groin and foot, have not been proven to be related to the work accident. Instead, Employer asserts these complaints were related to Claimant's 2001 four-wheeler

accident which pre-dated his work accident. Employer contends that Claimant is not disabled, as evidenced by his post-injury work as a member of a well crew, back hoe operator, supervisor and toolpusher in Wyoming, at a rate of pay higher than he earned at Employer. Finally, Employer asserts that Claimant's admission he could not pass a drug test at the time of the accident is sufficient evidence to bar his claim under Section 3(c) of the Act.

B. Credibility

It is well-settled that in arriving at a decision in this matter the finder of fact is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and is not bound to accept the opinion or theory of any particular medical examiner. *Banks v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459, 467 (1968); *Louisiana Insurance Guaranty Ass'n v. Bunol*, 211 F.3d 294, 297 (5th Cir. 2000); *Hall v. Consolidated Employment Systems, Inc.*, 139 F.3d 1025, 1032 (5th Cir. 1998); *Atlantic Marine, Inc. v. Bruce*, 551 F.2d 898, 900 (5th Cir. 1981); *Arnold v. Nabors Offshore Drilling, Inc.*, 35 BRBS 9, 14 (2001). Any credibility determination must be rational, in accordance with the law and supported by substantial evidence based on the record as a whole. *Banks*, 390 U.S. at 467; *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 945 (5th Cir. 1991); *Gilchrist v. Newport News Shipping and Dry Dock Co.*, 135 F.3d 915, 918 (4th Cir. 1998); *Huff v. Mike Fink Restaurant, Benson's Inc.*, 33 BRBS 179, 183 (1999).

In the present case, Claimant argues inconsistencies in his testimony regarding specific details of his accident and descriptions of his symptoms made to various doctors is not enough to render him an incredible witness. However, I note that the inconsistencies found in his testimony reach far beyond not being able to remember minute details of the accident or doctors' appointments from years ago. Rather, Claimant's testimony contains a number of internal inconsistencies wherein he contradicted himself directly, as well as instances where he contradicted his deposition testimony. Specifically, Claimant contradicted his own testimony regarding his drug conviction, his 2001 four-wheeler accident resulting in back, groin and left leg pain, the month in which he moved to Wyoming and the reasons he left his jobs at Aladdin and Cold Creek Well Services. Claimant also testified Dr. Watkins' medical records were wrong if they did not include his complaints of back pain in October, 2002, which were not noted until November, 2002. I find these discrepancies to be more than just a failure to remember minutia after the passage of multiple years. Rather, they represent significant topics of which it is reasonable to expect Claimant to have memory of at the hearing. His various

versions of what happened with respect to each of the issues above presents a serious doubt as to the veracity of the totality of his testimony. This is coupled with Claimant's own testimony that he has difficulty communicating. In light of these problems with his hearing testimony, I find Claimant to be a credible witness only to the extent his testimony is corroborated by the remainder of the evidence in record.

C. Causation

In establishing a causal connection between the injury and claimant's work, the Act should be liberally applied in favor of the injured worker in accordance with its remedial purpose. *Staffex Staffing v. Director, OWCP*, 237 F.3d 404, 406 (5th Cir. 2000), *on reh'g*, 237 F.3d 409 (5th Cir. 2000); *Morehead Marine Services, Inc. v. Washnock*, 135 F.3d 366, 371 (6th Cir. 1998)(*quoting Brown v. ITT/Continental Baking Co.*, 921 F.2d 289, 295 (D.C. Cir. 1990)); *Wright v. Connolly-Pacific Co.*, 25 BRBS 161, 168 (1991). Ordinarily the claimant bears the burden of proof as a proponent of a rule or order. 5 U.S.C. § 556(d). By express statute, however, the Act presumes a claim comes within the provisions of the Act in the absence of substantial evidence to the contrary.[6] 33 U.S.C. § 920(a). Should the employer carry its burden of production and present substantial evidence to the contrary, the claimant maintains the ultimate burden of persuasion by a preponderance of the evidence under the Administrative Procedures Act. 5 U.S.C. § 556(d); *Director, OWCP, v. Greenwich Collieries*, 512 U.S. 267, 281 (1994); *American Grain Trimmers, Inc., v. Director, OWCP*, 181 F.3d 810, 816-17 (7th Cir. 1999).

(1) The Section 20(a) Presumption - Establishing a *Prima Facie* Case

Section 2(2) of the Act defines "injury" as "accidental injury or death arising out of or in the course of employment." 33 U.S.C. § 902(2). Section 20(a) of the Act provides a presumption that aids the claimant in establishing that a harm constitutes a compensable injury under the Act:

[6] This is not to say that the claimant does not have the burden of persuasion. To be entitled to the Section 20(a) presumption, the claimant still must show a *prima facie* case of causation. *Port Cooper/T. Smith Stevedoring Co., Inc., v. Hunter*, 227 F.3d 285, 287 (5th Cir. 2000); *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 281 (1994).

> In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary…
>
> (a) That the claim comes within the provisions of this chapter.

33 U.S.C. § 920(a).

To establish a *prima facie* claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that: (1) the claimant sustained a physical harm or pain; and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused, aggravated, or accelerated the harm or pain. *Port Cooper/T. Smith Stevedoring Co., Inc., v. Hunter*, 227 F.3d 285, 287 (5th Cir. 2000); *O'Kelly v. Department of the Army*, 34 BRBS 39, 40 (2000); *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128, 129 (1984). Once this *prima facie* case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. *Hunter*, 227 F.3d at 287. However, "the mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." *U.S. Industries/Federal Sheet Metal Inc., v. Director, OWCP*, 455 U.S. 608 (1982). *See also Bludworth Shipyard Inc., v. Lira*, 700 F.2d 1046, 1049 (5th Cir. 1983)(stating a claimant must allege an injury arising out of and in the course and scope of employment); *Devine v. Atlantic Container Lines*, 25 BRBS 15, 19 (1990)(finding the mere existence of an injury is insufficient to shift the burden of proof to the employer).

(1)(a) Existence of Physical Harm or Pain

To show harm or injury a claimant must show that something has gone wrong with the human frame. *Crawford v. Director, OWCP*, 932 F.2d 152, 154 (2nd Cir. 1991); *Wheatley v. Adler*, 407 F.2d 307, 311-12 (D.C.Cir. 1968); *Southern Stevedoring Corp., v. Henderson*, 175 F.2d. 863, 866 (5th Cir. 1949). An injury cannot be found absent some work-related accident, exposure, event or episode. *Adkins v. Safeway Stores, Inc.*, 6 BRBS 513, 517 (1978). Under the aggravation rule, an entire disability is compensable if a work related injury aggravates, accelerates, or combines with a prior condition. *Gooden v. Director, OWCP*, 135 F.3d 1066, 1069 (5th Cir. 1998)(pre-existing heart disease); *Kubin v. Pro-Football, Inc.*, 29 BRBS 117, 119 (1995)(pre-existing back injuries).

In the present case, it is not disputed that Claimant's work accident resulted in a hematoma on his left shin. He was diagnosed with a shin contusion and

hematoma, which Dr. Kinnard testified could result in long-term swelling, tenderness, irritation and sensitivity. Dr. Rau diagnosed Claimant with a knee strain. Approximately one month after the accident Claimant also started voicing complaints of back pain, groin pain shooting down his left leg to his foot, as well as pain in his right hand. A bone scan performed in November, 2002, showed uptake in Claimant's right hand and sternum. On November 13, 2002, Dr. Kinnard diagnosed him with a lumbar muscle strain/sprain and sprained finger in his right hand.

In February, 2003, the emergency room doctors diagnosed Claimant with a tendon injury of the finger and contusion of the left hip. Throughout the spring of 2003 various doctors diagnosed him with pain in his hip, leg, groin, knee, SI joint and finger, as well as a possible femoral hernia. An MRI taken of Claimant's back on May 19, 2003, showed bulges at L4-5 and L5-S1 as well as degenerative facet joint disease extending from L3 to S1. X-rays taken May 25, 2003, revealed arthritic changes at L4-5.

Notwithstanding Claimant's inconsistent testimony, the objective medical diagnoses provided by his various physicians all indicate that Claimant has suffered physical harm or pain in his lower extremity, hip, groin, back and finger. As such, he has satisfied the first prong of the Section 20(a) presumption.

(1)(b) Establishing that an Accident Occurred in the Course of Employment, or that Conditions Existed at Work, Which Could Have Caused the Harm or Pain

Although a claimant is not required to introduce affirmative medical evidence establishing that working conditions caused the harm, a claimant must show the existence of working conditions that could conceivably cause the harm alleged beyond a "mere fancy or wisp of 'what might have been.'" *Wheatley*, 407 F.2d at 313. A claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141, 144 (1990)(finding a causal link despite the lack of medical evidence based on the claimant's reports); *Golden v. Eller & Co.*, 8 BRBS 846, 849 (1978), *aff'd*, 620 F.2d 71 (5th Cir. 1980)(same). On the other hand, uncorroborated testimony by a discredited witness is insufficient to establish the second element of a *prima facie* case that the injury occurred in the course and scope of employment, or conditions existed at work which could have caused the harm. *Bonin v. Thames Valley Steel Corp.*, 173 F.3d 843 (2nd Cir. 1999)(unpub.)(upholding ALJ ruling that the claimant did not produce credible evidence a condition existed at work which

could have cause his depression); *Alley v. Julius Garfinckel & Co.*, 3 BRBS 212, 214-15 (1976)(finding the claimant's uncorroborated testimony on causation not worthy of belief); *Smith v. Cooper Stevedoring Co.*, 17 BRBS 721, 727 (1985)(ALJ)(finding the claimant failed to meet the second prong of establishing a *prima facie* case because the claimant's uncorroborated testimony linking the harm to his work was not supported by the record).

In the present case, Claimant suffered a slip and fall while at work on September 19, 2002. He hit his left shin on a needle valve and testified the weight of a one hundred pound Kelly hose fell on top of him. Claimant's testimony was corroborated by his co-worker, Philip Badillo, who witnessed the accident. Furthermore, the medical records in evidence include descriptions of the accident consistent with Claimant's testimony.

It is not disputed that Claimant's left leg hematoma is the direct result of his work accident. Dr. Tessier testified back pain could manifest itself within a reasonable time after a traumatic injury; he defined a "reasonable time" as one to two months. Additionally, Dr. Kinnard testified that absent an intervening incident, Claimant's back pain could be related to his work accident. Dr. Kinnard also stated that the delay in Claimant's complaints of back pain did not mean he was not experiencing back pain. While no doctor commented on the connection between Claimant's fall and his finger sprain, I note that none of them questioned Claimant's statement that he hyperextended his finger when he fell. Most importantly, the corroborated description of Claimant's accident is consistent with subsequent back and finger injuries. I find there is sufficient evidence in record to support the conclusion that an accident happened at work which could have caused Claimant's pain. Claimant has therefore satisfied the second prong of the section 20(a) presumption. Thus, he has invoked the presumption and established a *prima facie* case.

(2) Rebuttal of the Presumption

"Once the presumption in Section 20(a) is invoked, the burden shifts to the employer to rebut it through facts - not mere speculation - that the harm was not work-related." *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 687-88 (5th Cir. 1999). To rebut the presumption of causation, the employer is required to present *substantial evidence* that the injury was not caused by the employment. *Noble Drilling v. Drake*, 795 F.2d 478, 481 (5th Cir. 1986). The Fifth Circuit described *substantial evidence* as a minimal requirement; it is "more than a modicum but less than a preponderance." *Ortco Contractors, Inc., v. Charpentier*, 332 F.3d 283, 290

(5th Cir. May 21, 2003). The Court went on to state an employer does not have to rule out the possibility the injury is work-related, nor does it have to present evidence unequivocally or affirmatively stating an injury is not work-related. "To place a higher standard on the employer is contrary to statute and case law." *Id.* at 289-90 (citing *Conoco, Inc.,* 194 F.3d at 690). *See Stevens v. Todd Pacific Shipyards Corp.*, 14 BRBS 626, 628 (1982), *aff'd mem.*, 722 F.2d 747 (9th Cir. 1983)(stating the employer need only introduce medical testimony or other evidence controverting the existence of a causal relationship and need not necessarily prove another agency of causation to rebut the presumption of Section 20(a) of the Act); *Holmes v. Universal Maritime Serv. Corp.*, 29 BRBS 18, 20 (1995)(stating that the "unequivocal testimony of a physician that no relationship exists between the injury and claimant's employment is sufficient to rebut the presumption.").

Employer did not offer medical evidence contradicting a causal relationship between Claimant's back injury and his September, 2002, work accident. The closest Employer got was Dr. Kinnard's testimony that any back injury "most likely" would have manifested itself by November 6, 2002, when he first treated Claimant. I do not find this statement to constitute substantial evident sufficient to rebut Claimant's *prima facie* case. Notably, Dr. Kinnard went on to testify Claimant's back injury could be related to the accident and diagnosed him with a back sprain which could have caused his groin pain, which he did complain about on November 6. No other doctor, and there were many, rebutted Claimant's *prima facie* case. Employer's argument that Claimant's delayed complaints of back and finger pain indicate they are not related to his accident are not supported by the medical evidence in record, and are therefore insufficient to rebut the presumption.

Employer also argues that any injury to Claimant's back and groin are related to his 2001 four-wheeler accident and not to his 2002 work accident. However, under the aggravation rule, an entire disability is compensable if a work-related accident and subsequent injury aggravates, accelerates, or combines with a prior condition. *Gooden v. Director, OWCP*, 135 F.3d 1066, 1069 (5th Cir. 1998) (pre-existing heart disease); *Kubin v. Pro-Football, Inc.*, 29 BRBS 117, 119 (1995) (pre-existing back injuries); *Gardner v. Bath Iron Works Corp.*, 11 BRBS 556 (1979) (compensating the effects of a progressive degenerative condition when that condition was aggravated by conditions at work), aff'd sub nom., *Gardner v. Director, OWCP*, 640 F.2d 1385 (1st Cir. 1981). Claimant's 2001 accident resulted in similar complaints of groin and back pain as he voiced in 2002, and Dr. Watson diagnosed a lumbar strain. X-rays of his back and lower extremity were normal, though no MRI films are available. Claimant returned to work at his usual job

where he stayed until his September, 2002, accident. There is no evidence that Claimant worked in pain or was unable to perform his job duties during this time. Only following his 2002 work accident did Claimant consistently voice complaints of back and groin pain. Mr. Archer, Claimant's chiropractor, testified Claimant appeared to have been in good condition between his two accidents, as evidenced by his continued work offshore. It is thus reasonable to conclude that even if Claimant had a prior accident resulting in similar injuries, his work accident in 2002 aggravated and/or combined with his prior injuries to result in his current physical condition. Thus, Employer's argument is without merit and does not constitute a rebuttal of Claimant's *prima facie* case.

In light of the foregoing, I find Employer has not met its burden of submitting substantial evidence to rebut Claimant's 20(a) presumption. Notwithstanding, even if this minimal, equivocal evidence would be sufficient to rebut the presumption, the record, when taken as a whole, as a whole weighs in favor of Claimant on the issue of causation. *See Del Vecchio v. Bowers*, 296 U.S. 280, 286-87 (1935); *Greenwich Collieries*, 512 U.S. at 281 (where the record evidence is evenly balanced the employer must prevail). Dr. Kinnard's statement that he would expect a back injury to manifest by the November 6, 2002 evaluation of Claimant is not supported by the other medical evidence or even his own testimony and records. Claimant presented to Dr. Kinnard on November 6 with complaints of groin pain; one week later, on November 13, Dr. Kinnard diagnosed him with a back strain which could have caused his groin pain. Additionally, Dr. Kinnard related Claimant's back injury to the work accident absent any intervening accidents, and no such incidents are noted in the record. Dr. Tessier testified Claimant's back pain manifested itself within a reasonable time following the accident. No doctor affirmatively stated Claimant's back pain was not related to his accident. Therefore, I find the preponderance of the credible evidence supports Claimant and does not support Employer's assertion that his back condition was not the result of his 2002 work accident.

(3) Intoxication Defense

Section 3(c) of the Act provides that "no compensation shall be payable if the injury was occasioned solely by the intoxication of the employee . . ." Even if Claimant was injured in the course of employment, Section 3(c) works to bar compensation if the injury was caused solely by his intoxication. *Oliver v. Murray's Steaks*, 17 BRBS 105 (1985); *Walker v. Universal Terminal & Stevedoring Corp.*, 645 F.2d 170 (3rd Cir. 1981). However, the statute recognizes a presumption against a finding of intoxication. *Id*. at 173. Specifically,

> [i]n any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in absence of substantial evidence to the contrary ─
>
> > (c) That the injury was not occasioned solely by the intoxication of the injured employee.

33 U.S.C. § 920(c).

This presumption has weight, however, only in the absence of substantial evidence negating the presumption. *Id*.; *Shelton v. Pacific Architects & Engineers*, 1 BRBS 306 (1975). Once evidence is presented sufficient to justify a finding contrary to the presumption, it has no affect on the case. *Walker*, 645 F.2d at 173, citing *Del Vecchio v. Bowers*, 296 U.S. 280 (1935). While the Section 20(c) presumption cannot be rebutted by proof of intoxication alone, every other hypothetical cause of injury need not be negated. *Id*. at 176; *Sheridon v. Petro-Drive, Inc*., 18 BRBS 57 (1986).

In the present case, the only evidence of Claimant's alleged intoxication was the testimony of Mr. Badillo that Claimant told him he did not want to fill out an accident form because he could not pass a drug test at the time of the accident. Although the rules of evidence followed by the administrative law judges generally allow for the admission of such hearsay, it is of great importance that Mr. Badillo only provided this "information" at the request of an attorney more than one year after the incident took place. Furthermore, it is inconsistent with what actually happened following Claimant's injury. Claimant testified he did report his accident to his supervisor, Mr. Whitney, as corroborated by Mr. Hartfield's testimony. Claimant also reported the accident to Mr. Hartfield, the supervisor of a different shift. Employer's policy is for supervisors to fill out all accident reports; thus, Claimant followed company protocol by timely reporting his accident to his supervisors. This directly negates Mr. Badillo's testimony Claimant did not want to fill out an accident report; if he had not wanted to fill out a report in order to avoid a drug test, Claimant would not have reported his accident at all. Moreover, there is no objective evidence in the form of drug test results which indicate Claimant was intoxicated at the time of his injury. Mr. Badillo's hearsay testimony, of questionable veracity, is wholly insufficient to rebut the Section 20(c) presumption that Claimant's accident was not the sole result of his alleged intoxication.

I find that Employer's defenses to the causation of Claimant's injury are insufficient to relieve them of liability. Specifically, Employer has failed to present sufficient evidence to rebut either the Section 20(a) or 20(c) presumptions which establish causation. As such, Claimant is entitled to disability benefits under the Act.

D. Nature and Extent

Disability under the Act is defined as "incapacity because of injury to earn wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Disability is an economic concept based upon a medical foundation distinguished by either its nature (permanent or temporary) or the extent (total or partial). A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968); *Seidel v. General Dynamics Corp.*, 22 BRBS 403, 407 (1989); *Stevens v. Lockheed Shipbuilding Co.*, 22 BRBS 155, 157 (1989).

(1) Nature of Disability

The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of maximum medical improvement (MMI). The determination of when MMI is reached, so a claimant's disability may be said to be permanent, is primarily a question of fact based on medical evidence. *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87, 91 (1989); *Care v. Washington Metro Area Transit Authority*, 21 BRBS 248 (1988). An employee is considered permanently disabled if he has any residual disability after reaching MMI. *Lozada v. General Dynamics Corp.*, 903 F.2d 168, 23 BRBS (CRT)(2d Cir. 1990); *Sinclair v. United Food & Commercial Workers*, 13 BRBS 148 (1989). A condition is permanent if a claimant is no longer undergoing treatment with a view towards improving his condition, *Leech v. Service Engineering Co.*, 15 BRBS 18 (1982), or if his condition has stabilized. *Lusby v. Washington Metropolitan Area Transit Authority*, 13 BRBS 446 (1981).

Here, Dr. Ritterbusch was the only physician who assigned Claimant an MMI date, and he did so on January 30, 2004. Specifically, Dr. Ritterbusch recommended conservative treatment instead of surgery, and opined Claimant's condition would not improve in the future. This is consistent with the fact that Claimant's complaints of pain reached a plateau in the latter part of 2003,

complemented by no noted change in his condition by any of the doctors to examine him. In light of the medical evidence in record, I find Claimant's condition reached MMI on January 30, 2004, and his temporary disability became permanent as of that date.

(2) Extent of Disability and Suitable Alternative Employment

Case law has held that to establish a *prima facie* case of total disability under the Act, a claimant must prove he can no longer perform his former longshore job due to his job-related injury. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038 (5th Cir. 1981); *P&M Crane Co., v. Hayes*, 930 F.2d 424, 429-30 (5th Cir. 1991); *SGS Control Serv. v. Director, OWCP*, 86 F.3d 438, 444 (5th Cir. 1996). He need not establish he cannot return to *any* employment, only that he cannot return to his former employment. *Elliot v. C&P Telephone Co.*, 16 BRBS 89 (1984). If a claimant meets this burden, he is presumed to be totally disabled. *Walker v. Sun Shipbuilding & Dry Dock Co.*, 19 BRBS 171 (1986).

Here, on April 29, 2003, Dr. Tessier opined Claimant was unable to work secondary to his pain. Mr. Archer also testified he would have restricted Claimant from working offshore between March and June 2003. In July, 2003, Claimant worked as a crew supervisor at Aladdin Field Services, followed by a similar position at Cold Creek Well Services which lasted a few months. The record does not contain any description of Claimant's duties or the physical demand level of his position, but he testified that as a supervisor he basically told the crew what to do; his job did not involve physical activities. Despite Claimant's conflicting testimony as to the reasons he left these positions, Dr. Tessier testified that as of November, 2003, at the latest, Claimant was capable of light duty work that did not involve heavy lifting or driving. Dr. Milner released Claimant to activity as tolerated on December 31, 2003.

In January 2004, Dr. Ritterbusch encouraged Claimant to find work; however, in his notes from October 14, 2004, Claimant informed him he could work three to four days, but then needed a few days off because of his pain. Notwithstanding Claimant's symptoms and his positive MRI reports, Dr. Ritterbusch stated he would not limit Claimant's ability to work. However, he further recommend Claimant undergo a functional capacity evaluation, which demonstrates there may be limitations to Claimant's physical abilities and is inconsistent with a release to work without restrictions. Overall, the medical opinions from April 2003 through October 2004 indicate Claimant cannot return to his previous heavy duty job at Employer working offshore. Rather, he appears to

have some limitations on his physical abilities. Although Claimant was released to his usual job by Dr. Watkins and Dr. Kinnard in 2002, neither doctor continued treating Claimant long term, nor did they not know how his condition progressed throughout 2003 and 2004. I therefore find Claimant has proven he cannot return to his former job offshore sufficient to establish a *prima facie* case of total disability.

Once the *prima facie* case of total disability is established, the burden shifts to the employer to establish the availability of suitable alternative employment. *Turner*, 661 F.2d at 1038; *P&M Crane*, 930 F.2d at 430; *Clophus v. Amoco Prod. Co.*, 21 BRBS 261, 265 (1988). To establish suitable alternative employment, an employer must prove the availability of actual employment opportunities within Claimant's geographical location which he could perform considering his age, education, work experience and physical restriction. *Turner*, 661 F.2d at 1042-43; *Edwards v. Director, OWCP,* 99 F.2d 1374 (9th Cir. 1993); *cert. denied* 511 U.S. 1031 (1994). The finder of fact may rely on the testimony of a vocational expert in determining the existence of suitable alternative employment, even if the expert did not examine the claimant, as long as the expert is aware of the claimant's age, education, work experience and physical restrictions. *Hogan v. Schiavone Terminal*, 23 BRBS 290 (1990); *Southern v. Farmers Export Co.*, 17 BRBS 64, 66-67 (1985).

"An award of total disability while a claimant is working is the exception and not the rule." *Carter v. General Elevator Co.*, 14 BRBS 90, 97 (1981). *See also Everett v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 316 (1989); *Jordan v. Bethlehem Steel Corp.*, 19 BRBS 82 (1986). If the claimant is performing satisfactorily and for pay, then barring other signs of beneficence or extraordinary effort, the work precludes an award for total disability. *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 334 (1981).

In the present case, Employer submitted no evidence of suitable alternative employment for Claimant. Claimant has not undergone a functional capacity evaluation, and no vocational assessment has been performed. However, Claimant was able to work at Aladdin Well Services and Cold Creek Well Services as of July, 2003, indicating he has the capacity to earn wages post-injury. Claimant himself testified his position at Aladdin was supervisory in nature and did not involve much physical exertion except to demonstrate tasks to his crew; at Cold Creek he was an operator/driller. Absent any other evidence as to his duties in these positions, I am limited to relying on Claimant's testimony with respect to this issue. I therefore find Claimant's work in Wyoming was consistent with the

opinions of Dr. Tessier, Dr. Milner and Dr. Ritterbusch that Claimant could perform light duty work and work as tolerated.

At the formal hearing Claimant provided conflicting testimony as to the reasons he left Aladdin and Cold Creek, stating he was let go because of a lack of work and because of his pain levels. However, Claimant notably testified at his March 7, 2005 deposition that he voluntarily stopped working at Aladdin because "Basically I was just gonna call the goods after that, because I got a little money together. Hopefully something would go on here. Because I waited that long, I just pretty much thought I was going to get back on my workmen's comp until I got my physical therapy done." (EX-7, p. 3). Thus, I find Claimant was physically capable of performing his jobs at Aladdin and Cold Creek, and did not leave either position secondary to his disability. He failed to prove that he was only able to work through extraordinary effort, as he did not seek medical treatment between January and October 2004, and after his prescription ran out he only took ibuprofen to relieve his pain. Thus, I find Claimant's total disability became partial as of July 21, 2003, when he started work at Aladdin Well Services.

In determining wage earning capacity Section 8(h) provides that claimant's earning capacity shall be his actual post-injury earnings if these earnings fairly and reasonably represent his true earning capacity. Section 8(h) provides a two-step process to determine post-injury wage earning capacity. First, one must consider whether a claimant's post-injury wages accurately reflect actual wage earning capacity. If so, then the second step need not be reached. *Randall v. Comfort Control, Inc.*, 725 F.2d 791, 797 (D.C. Cir. 1984). If not, then one must consider the claimant's actual capacity for gainful employment. *Walsh v. Northfolk Dredging Co.*, 878 F.2d 380 (4th Cir. 1989)(Table). In the present case I find Claimant's post-injury earnings fairly and reasonably represent his true earning capacity. As noted above, he was physically capable of performing the jobs, which were of a similar nature to the work he performed at Employer and were comparable in their pay. Absent the actual pay records from Aladdin and Cold Creek I am limited to Claimant's testimony that he earned $1,100.00 every two weeks at Aladdin, or $550.00 per week. Claimant's stipulated average weekly wage at the time of his accident was $567.00, thus he has suffered a loss of wage earning capacity of $17.00 per week.

In conclusion, I find Claimant is entitled to temporary total disability benefits from September 19, 2002, until he started work at Aladdin Well Services on July 21, 2003. He is thereafter entitled to temporary partial disability benefits based on a loss of wage earning capacity of $17.00 per week, until he reached

MMI on January 30, 2004. Claimant's temporary partial disability became permanent on that date, and it continues to the present time based on the finding that he is unable to return to heavy duty offshore work he was performing at Employer at the time of his accident.

E. Section 7 Medical Expenses

Section 7(a) of the Act provides that "the employer shall furnish such medical, surgical, and other attendance or treatment . . . for such period as the nature of the injury or the process of recovery may require." 33 U.S.C. § 907(a). The Board interpreted this provision to require an employer to pay all reasonable and necessary medical expenses arising from a workplace injury. *Dupre v. Cape Romaine Contractors, Inc.*, 23 BRBS 86 (1989). A claimant establishes a *prima facie* case when a qualified physician indicates that treatment is necessary for a work-related condition. *Romeike v. Kaiser Shipyards*, 22 BRBS 57, 60 (1989). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. *Colburn v. General Dynamics Corp.*, 21 BRBS 219, 222 (1988). The employer bears the burden of showing by substantial evidence that the proposed treatment is neither reasonable nor necessary. *Salusky v. Army Air Force Exchange Service*, 3 BRBS 22, 26 (1975)(any question about the reasonableness or necessity of medical treatment must be raised by the complaining party before the ALJ). Medical care provided in an emergency situation is compensable, even if the doctor is not authorized by the employer. 33 U.S.C. § 907(c)(1)(C); *Roger's Terminal and Shipping Corp., v. Director, OWCP*, 784 F.2d 687 (5th Cir. 1985); *cert. denied*, 479 U.S. 826 (1986).

I have established Claimant's back and leg conditions are casually related to his September, 2002, work accident, and he is entitled to temporary and permanent total disability benefits for such. None of Claimant's doctors have recommended surgery to improve his condition. Rather, he has been prescribed medication, physical therapy, epidural steroid injections and periodic diagnostic tests such as MRIs and X-rays. I find this treatment plan to be conservative in nature. Moreover, it has proven effective as chiropractic treatment, medications and the epidural steroid injections provided Claimant relief in the past. Thus, I find the treatments recommended by Claimant's physicians, as well as the treatment he received in Terrebonne General Medical Center's emergency room and from his chiropractor, constitute reasonable and necessary treatment for his current condition. Claimant's injuries have been causally related to his work accident, and thus, his medical treatments are compensable under Section 7 of the Act.

F. Interest

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. *Avallone v. Todd Shipyards Corp.*, 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. *Watkins v. Newport News Shipbuilding & Dry Dock Co.*, *aff'd in pertinent part and rev'd on other grounds, sub nom*. *Newport News v. Director, OWCP*, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that "...the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). This order incorporates by reference this statute and provides for its specific administrative application by the District Director. *See Grant v. Portland Stevedoring Company, et al.*, 17 BRBS 20 (1985).

Effective February 27, 2001, this interest rate is based on a weekly average one-year constant maturity Treasury yield for the calendar week preceding the date of service of this Decision and Order by the District Director. This Order incorporates by reference this statute and provides for its specific administrative application by the District Director.

G. Attorney Fees

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision to submit an application for attorney's fees. A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

V. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I enter the following Order:

1. Employer shall pay to Claimant temporary total disability compensation pursuant to Section 908(b) of the Act for the period from September 19, 2002 to July 20, 2003, based on a stipulated average weekly wage of $567.00 and a corresponding compensation rate of $378.00.

2. Employer shall pay to Claimant temporary partial disability pursuant to Section 908(e) of the Act for the period from July 21, 2003 until January 29, 2004, based on a loss of wage earning capacity of $17.00 per week and a corresponding compensation rate of $11.33.

3. Employer shall pay to Claimant permanent partial disability pursuant to Section 908(c) of the Act for the period from January 30, 2004, to the present and continuing, based on a loss of wage earning capacity of $17.00 per week and a corresponding compensation rate of $11.33.

4. Employer shall be entitled to a credit for all compensation benefits previously paid to Claimant under the Act amounting to $6,031.76.

5. Employer shall pay Claimant for all future reasonable medical care and treatment arising out of his work-related injuries pursuant to Section 7(a) of the Act.

6. Employer shall pay Claimant interest on accrued unpaid compensation benefits, in accordance with this decision.

7. Claimant's counsel shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges, serving a copy thereof on Claimant and opposing counsel who shall have twenty (20) days to file any objection thereto.

A

CLEMENT J. KENNINGTON
Administrative Law Judge